

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant)	

TO: Chief Administrative Law Judge Richard L. Sippel

**DEFENDANT’S RESPONSE TO COMPLAINANT’S OBJECTIONS TO THE
WRITTEN TESTIMONY AND DIRECT CASE EXHIBITS OF DEFENDANT**

Defendant Cablevision Systems Corporation (“Cablevision”) submits this response to the objections made by Complainant Game Show Network, LLC (“GSN”) in its pre-hearing submission filed on March 15, 2013. Among other things, GSN erroneously: (1) objects to the introduction into evidence of documents produced by GSN during the course of discovery in this matter, and which clearly constitute party-opponent admissions under Federal Rule of Evidence 801, as “lacking foundation”; (2) objects to documents which are highly probative of certain disputed issues of fact (including, for example, market conditions facing MVPDs like Cablevision and GSN’s owner, DIRECTV, at the time of Cablevision’s decision to re-tier GSN) on relevance and Federal Rule of Evidence 403 grounds; and (3) objects to documents and testimony on hearsay grounds that Cablevision is either not offering for the truth of the matter asserted or which plainly falls under an exception to the hearsay rule under Federal Rule of

Evidence 803 or Federal Rule of Evidence 807. Cablevision sets forth below the evidentiary bases for the introduction of the exhibits and testimony to which GSN objects.

I. GSN'S OBJECTIONS TO CABLEVISION'S EXHIBITS LACK MERIT

- **The Personal Knowledge Foundation Requirement Set Forth in Rule 602 Does Not Apply to Party-Opponent Admissions.** GSN objects to the introduction into evidence of no fewer than twenty documents that GSN itself produced in this matter in direct response to Cablevision's requests on the grounds that the documents "lack foundation." Specifically, it is GSN's position that because Cablevision has no "sponsoring witness" to introduce these documents into evidence at the upcoming hearing, they are purportedly inadmissible under Federal Rule of Evidence 602's personal knowledge requirement. This argument, however, misses the mark because it is without dispute that the documents to which GSN objects *all* constitute party-opponent admissions under Rule 801(d)(2). As such, as well established case law makes clear, Rule 602 does not apply.¹

- **Prevailing Market Conditions at the Time of Cablevision's Decision to Re-tier GSN Are Highly Probative.** GSN also objects to the introduction into evidence of three documents that show the prevailing market conditions at the time of Cablevision's decision to re-tier GSN, asserting that such documents are irrelevant and overly prejudicial. They are neither. Documents regarding the market conditions being experienced by cable operators (including GSN's owner, DIRECTV) at the time of Cablevision's decision to re-tier GSN – including, for example, the higher costs associated with sports programming and retransmission of broadcast networks – are clearly relevant to the question of whether Cablevision's actions were the product of good faith business judgments or discrimination on the basis of affiliation, especially since higher programming

¹ Courts have consistently and repeatedly held that the personal knowledge foundation requirement of F.R.E. 602 does not apply to the admissions of a party-opponent (which are admissible under F.R.E. 801(d)(2)). See *United States v. Savage*, CRIM.A. 07-550-03, 2013 WL 271894 (E.D. Pa. Jan. 24, 2013) ("Statements that constitute party admissions . . . are not subject to the personal knowledge requirement of Rule 602."); *In re Estate of Daniel Maggio*, No. 2011-433, 2012 WL 55992162, at ¶ 26 (Vt. Nov. 30, 2012) ("Most federal appeals courts that have considered the matter have concluded that admissions pursuant to F.R.E. 801(d)(2) are not subject to the "firsthand knowledge requirement."); *Blackburn v. UPS, Inc.*, 179 F.3d 81, 96 (3d Cir.1999) ("Admissions by a party-opponent need not be based on personal knowledge to be admitted under Rule 801(d)(2)."); *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 8–9 (1st Cir.1986) ("We note that the Advisory Committee for the Federal Rules of Evidence refused to make personal knowledge a prerequisite to the admissibility of admissions [of party-opponents]."); *United States v. Ammar*, 714 F.2d 238, 254 (3d Cir.1983) (noting the Advisory Committee Notes to Rule 602 make clear that the personal knowledge foundation requirement was not intended to apply to admissions admissible under Rule 801(d)(2)).

costs was the primary reason for Cablevision's decision to re-tier GSN. These documents are not only relevant, but, given their highly probative nature, GSN also cannot show that this evidence's probative value is "substantially outweighed" by the potential for prejudice (as required by Federal Rule of Evidence 403).²

- **How GSN and WE tv Are Perceived by MVPDs is Relevant.** GSN also objects to the introduction of DIRECTV's and DISH's media kits on several grounds, including hearsay.³ Those informational brochures, which are prepared by DISH and DIRECTV for their advertisers, reflect that both MVPDs sell advertising across a "cluster" of women's networks so that advertisers seeking to reach women viewers can buy advertising on a number of networks in which those viewers are concentrated. Notably, in both media kits, WE tv is included in that cluster; GSN is not. Cablevision, however, is not introducing these documents for the truth of any statements made by DIRECTV or DISH therein. That is, Cablevision does not seek to use these documents to show that WE tv is, in fact, a women's network or that GSN, in fact, is not a women's network, as those media kits reflect. Rather, Cablevision seeks to introduce these documents to show that DIRECTV and DISH perceive, and therefore group, these two cable networks differently.⁴ As such, the documents are not hearsay and, even were this Court to conclude otherwise, they would still fall into the hearsay exception which allows documents reflecting a declarant's "state of mind" into evidence.⁵ Further, these documents also may be admitted under the residual hearsay exception set forth in Federal Rule of Evidence 807 because these media kits have an indicia of reliability.⁶ DIRECTV and DISH are major MVPDs that are well-respected and sell advertising through these clusters throughout the industry. Indeed, both GSN and WE tv regularly purchase advertising using these clusters,

- **Cablevision Does Not Seek to Play Video Evidence During the Hearing.** GSN objects to the introduction of any video evidence. But, Cablevision does not seek to play any of the video files on its exhibit list during

² See FED R. EVID. 403 & advisory committee's notes.

³ GSN also objects to these documents as irrelevant, overly prejudicial and lacking sufficient foundation to introduce through a sponsoring witness. These objections are likewise without merit.

Further, these documents are plainly relevant to the question of whether or not GSN and WE tv are similarly situated because they show how the networks are perceived within the cable television industry. Finally, the probative value of these media kits is not "substantially outweighed" by the danger of unfair prejudice under Fed. R. Evid. 403.

⁴ See FED. R. EVID. 801.

⁵ See FED. R. EVID. 803(3).

⁶ See FED. R. EVID. 807 & advisory committee notes.

the hearing. Instead, it includes certain sizzle reels – [REDACTED] – for the convenience of and reference by the Presiding Judge and the Enforcement Bureau. These videos, [REDACTED], are plainly relevant to any analysis of whether or not GSN and WE tv are similarly situated – indeed, they are the best evidence of the actual programming offered by both networks.

II. CABLEVISION’S RESPONSES TO GSN’S DIRECT TESTIMONY OBJECTIONS

- **Out-of-Court Statements to which GSN Objected in Cablevision’s Written Direct Testimony Are Not Hearsay, but Are Offered to Show State-of-Mind.** GSN objects to portions of the written direct testimony of Thomas Montemagno, Robert Broussard and Kim Martin on the grounds that they contain hearsay inadmissible under Federal Rule of Evidence 802. Much of the testimony GSN finds objectionable, however, is not hearsay at all because it is not being offered for its truth. “Testimony is not hearsay if it is offered only to show the context within which the parties had been acting, or to show a party’s motive or intent for behavior.”⁷ Similarly, statements are not hearsay “when offered not for their truth but to prove the extent of a declarant’s knowledge or a recipient’s notice of certain conditions.”⁸ The testimony to which GSN objects is being offered exclusively to demonstrate Mr. Montemagno’s, Mr. Broussard’s and Ms. Martin’s knowledge about, and notice of, certain negotiations, the context for their actions, and their motives; accordingly, none of the testimony to which GSN objects is hearsay.

- **Kim Martin’s Testimony Regarding WE tv’s Competitive Set Is Not Hearsay and Is Based on Personal Knowledge.** GSN objects to Ms. Martin’s testimony regarding WE tv’s competitive set. This portion of her testimony, in which Ms. Martin explains why she perceives certain other women’s networks to be WE tv’s competitors, is not hearsay as it does not refer to any out-of-court statements. Moreover, Ms. Martin has the requisite personal knowledge under Federal Rule of Evidence 602 regarding WE tv’s competitive set based on her years of experience in the cable television industry and constant monitoring of WE tv’s competitors.

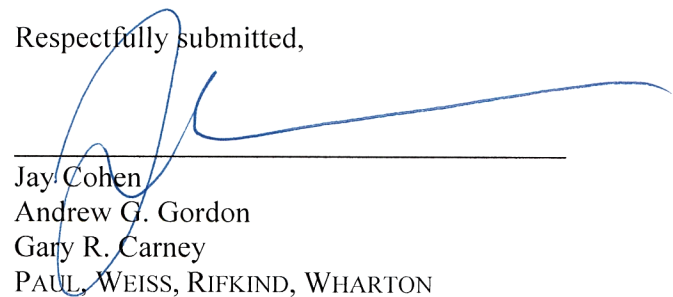
⁷ WEINSTEIN’S FEDERAL EVIDENCE: 5 § 801.11[5][b]; see also *Baker v. United Def. Indus., Inc.*, 403 Fed. App’x 751, 754 (3d Cir. 2010) (negative employee review established company’s state-of-mind as to how fired employee was viewed by his peers); *Marks v. Marina Dist. Dev. Co., LLC*, 213 Fed. App’x 147, 153 (3d Cir. 2007) (testimony by officer about contents of a police dispatch call admitted to “demonstrate their effect on the listener”).

⁸ WEINSTEIN at § 801.11[5][a].

REDACTED – FOR PUBLIC INSPECTION

Defendant's specific responses to Complainant's objections are attached.

Respectfully submitted,



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Counsel for Cablevision Systems Corporation

March 20, 2013

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Overall Project Summary					
Project ID	Project Name	Project Manager	Start Date	End Date	Status
P001	Project Alpha	John Doe	2023-01-01	2023-03-31	Completed
P002	Project Beta	Jane Smith	2023-02-01	2023-04-30	In Progress
P003	Project Gamma	Mike Johnson	2023-03-01	2023-05-31	On Hold
P004	Project Delta	Sarah Lee	2023-04-01	2023-06-30	Planned
P005	Project Epsilon	David Kim	2023-05-01	2023-07-31	On Hold
P006	Project Zeta	Emily White	2023-06-01	2023-08-31	Planned
P007	Project Eta	Chris Brown	2023-07-01	2023-09-30	On Hold
P008	Project Theta	Alex Green	2023-08-01	2023-10-31	Planned
P009	Project Iota	Olivia Black	2023-09-01	2023-11-30	On Hold
P010	Project Kappa	Noah Grey	2023-10-01	2023-12-31	Planned

REDACTED - FOR PUBLIC INSPECTION

[REDACTED]					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

REDACTED - FOR PUBLIC INSPECTION

[REDACTED]					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[illegible]

[REDACTED]					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[illegible]

[illegible]

[REDACTED]					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[illegible]

REDACTED - FOR PUBLIC INSPECTION

[REDACTED]					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
					[REDACTED]
					[REDACTED]

[illegible]

[illegible]